

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

AMY MARCH, aka AMY CARNAZZO,)
)
 Plaintiff,)
)
 v.)
)
 PINNACLE MORTGAGE OF NEVADA, LLC,)
 et al.,)
)
 Defendants.)

3:11-cv-319-RCJ-VPC

ORDER

Currently before the Court are a Motion to Remand (#4), Motion to Dismiss (#7), Motion to Stay (#9), Motion to Dismiss (#19), Emergency Motion to Extend Time (#35), and Emergency Motion to Withdraw as Attorney (#36). The Court heard oral argument on September 27, 2011.

BACKGROUND**I. Facts**

Plaintiff Amy March, aka Amy Carnazzo ("Plaintiff") executed a note secured by a deed of trust on a piece of property located at 6780 Diamond Glen Drive, Reno, Nevada 89523, which was recorded in Washoe County on April 5, 2005. (Deed of Trust (#7-1) at 8, 10). The mortgage, dated April 1, 2005, was for \$292,800. (*Id.* at 9). The lender and beneficiary on the deed of trust was Pinnacle Mortgage of Nevada, LLC ("Pinnacle Mortgage"). (*Id.* at 8-9). The trustee on the deed of trust was United Title of Nevada. (*Id.* at 9).

On April 1, 2005, Pinnacle Mortgage executed an assignment of the deed of trust and granted, sold, assigned, transferred, and conveyed to Wells Fargo Bank, N.A., all beneficial interest in the deed of trust. (Assignment of Deed of Trust (#7-1) at 30-31).

1 On May 19, 2010, Trustee Corps, as the attorney-in-fact for Wells Fargo, executed a
2 substitution of trustee, and replaced Trustee Corps as the trustee for United Title of Nevada.
3 (Substitution of Trustee (#7-1) at 38).

4 That same day, May 19, 2010, Trustee Corps recorded a notice of default and election
5 to sell with the Washoe County Recorder's office. (Notice of Default (#7-1) at 34). The notice
6 of default indicated that Plaintiff had "failed to pay payments which became due." (*Id.*). The
7 notice of default stated that Plaintiff had the right to cure the default, pursuant to NRS §
8 107.080. (*Id.*). The notice of default informed Plaintiff that if she did not cure the default within
9 the statutory period, her right of reinstatement would terminate and her property could be sold
10 thereafter. (*Id.* at 34-35). The notice of default provided Wells Fargo Bank's address and
11 phone number and directed Plaintiff to contact Wells Fargo to determine the amount to cure
12 the default. (*Id.* at 35).

13 On April 12, 2011, Trustee Corps recorded a certificate from the Nevada Foreclosure
14 Mediation Program indicating that the beneficiary could proceed with the foreclosure process
15 because no request for mediation had been made or the grantor had waived mediation.
16 (Mediation Certificate (#7-1) at 43). That same day, April 12, 2011, Trustee Corps recorded
17 a notice of trustee's sale, scheduled for May 6, 2011, with the Washoe County Recorder's
18 office. (Notice of Trustee's Sale (#7-1) at 40). On April 27, 2011, Plaintiff's attorney filed a
19 notice of lis pendens. (Notice of Lis Pendens (#7-1) at 45).

20 **II. Complaint**

21 In May 2011, MTC Financial, Inc. dba Trustee Corps ("Trustee Corps") filed a petition
22 for removal to this Court based on federal question jurisdiction, specifically the Fair Debt
23 Collection Practices Act ("FDCPA"). (Pet. for Removal (#1) at 2). Trustee Corps attached the
24 first amended complaint from the Second Judicial District Court in Washoe County. (Comp.
25 (#1) at 4-21). In the complaint, Plaintiff sued Pinnacle Mortgage of Nevada, LLC; Trustee
26 Corps; Doe Local Handyman/Locksmith (an unknown entity); Doe Local Lawn Maintenance
27 Company (an unknown entity); and Wells Fargo Bank, NA. (*Id.* at 4). Plaintiff's complaint
28 listed nine causes of action. (*Id.* at 6-20).

1 In the first cause of action, Plaintiff alleged trespass. (*Id.* at 6). The complaint alleged
2 that, on January 21, 2011, Plaintiff returned home and discovered that intruder(s) had entered
3 her home through the garage and had broken and removed door handles, had opened all the
4 cabinets and closets, had put anti-freeze in the drains and toilets, and had turned off her water
5 supply. (*Id.* at 6-7). The intruders returned later that day and removed all the food from her
6 refrigerator. (*Id.* at 7). Plaintiff found a notice on her door indicating that her house had been
7 “winterized.” (*Id.*). On January 22, 2011, she was at her home when a yard maintenance man
8 asked her if she was the new owner. (*Id.*). When she said no and asked who he was, he
9 responded that he was “with the bank.” (*Id.*). She asked the maintenance men to leave and
10 when they refused, she called the police and reported the incident. (*Id.*).

11 In the second cause of action, Plaintiff alleged conversion against defendants because
12 they unlawfully converted her property to their own use by asserting dominion and control over
13 property to which they did not hold ownership or possessory rights. (*Id.* at 8). In the third
14 cause of action, Plaintiff alleged a violation of the Truth in Lending Act (“TILA”), 15 U.S.C. §
15 1641(f)(2) because her mortgage was transferred immediately without her notice. (*Id.* at 9).
16 In the fourth cause of action, Plaintiff sought declaratory relief that her notice of default was
17 defective and null and void. (*Id.* at 10-12). In the fifth cause of action, Plaintiff alleged
18 violations of Nevada’s Fair Debt Collection law, NRS § 649.370, which provides that any
19 violation of the federal FDCPA is a violation of Nevada law. (*Id.* at 12). Plaintiff alleged that
20 Trustee Corps was a debt collector. (*Id.*). In the sixth cause of action, Plaintiff alleged
21 violations of Nevada’s Unfair and Deceptive Trade Practices Act, NRS § 598.0923, because
22 Defendants conducted business without the required licenses. (*Id.* at 13). In the seventh
23 cause of action, Plaintiff sought to quiet title. (*Id.* at 14).

24 In the eighth cause of action, Plaintiff sought to rescind and/or void the loan agreements
25 based upon mistake and lack of a meeting of the minds at contract formation because she did
26 not know that her loan would be serviced by a loan servicing company who did not have the
27 same authority to amend, modify, or alter the terms of the loan that an original lender would
28 have. (*Id.* at 14-16). She asserted that she would not have entered into the loan had she

1 understood that she would be working with a loan servicing company instead of her lender.
2 (*Id.* at 18). She admitted that she had not read the loan documents before signing them. (*Id.*).
3 She alleged that she executed the loan documents on the mistaken belief that she was going
4 to be in a borrower/lender relationship even though the lender knew that there would be no
5 borrower/lender relationship. (*Id.* at 19). In the ninth cause of action, she alleged statutory
6 violations of NRS § 107.080. (*Id.* at 20).

7 LEGAL STANDARD

8 When considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the
9 court must accept as true all factual allegations in the complaint as well as all reasonable
10 inferences that may be drawn from such allegations. *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1150
11 n.2 (9th Cir. 2000). Such allegations must be construed in the light most favorable to the
12 nonmoving party. *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000). In general, the
13 court should only look to the contents of the complaint during its review of a Rule 12(b)(6)
14 motion to dismiss. However, the court may consider documents attached to the complaint or
15 referred to in the complaint whose authenticity no party questions. *Id.*; see *Durning v. First*
16 *Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987).

17 The analysis and purpose of a Rule 12(b)(6) motion to dismiss for failure to state a
18 claim is to test the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th
19 Cir. 2001). The issue is not whether a plaintiff will ultimately prevail but whether the claimant
20 is entitled to offer evidence to support the claims. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246,
21 249 (9th Cir. 1997) (quotations omitted). To avoid a Rule 12(b)(6) dismissal, a complaint does
22 not need detailed factual allegations; rather, it must plead “enough facts to state a claim to
23 relief that is plausible on its face.” *Clemens v. Daimler Chrysler Corp.*, 534 F.3d 1017, 1022
24 (9th Cir. 2008) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955,
25 1964, 167 L.Ed.2d 929 (2007)); *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 1949, 173
26 L.Ed.2d 868 (2009) (stating that a “claim has facial plausibility when the plaintiff pleads factual
27 content that allows the court to draw the reasonable inference that the defendant is liable for
28 the misconduct alleged”). Even though a complaint does not need “detailed factual

1 allegations” to pass muster under 12(b)(6) consideration, the factual allegations “must be
 2 enough to raise a right to relief above the speculative level . . . on the assumption that all the
 3 allegations in the complaint are true (even if doubtful in fact).” *Twombly*, 550 U.S. at 555, 127
 4 S.Ct. at 1965. “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the
 5 elements of a cause of action will not do.” *Iqbal*, ___ U.S. at ___, 129 S.Ct. at 1949. “Nor
 6 does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual
 7 enhancements.’” *Id.* (quoting *Twombly*, 550 U.S. at 557, 127 S.Ct. at 1966).

8 If the court grants a motion to dismiss a complaint, it must then decide whether to grant
 9 leave to amend. The court should “freely give” leave to amend when there is no “undue delay,
 10 bad faith or dilatory motive on the part of the movant . . . undue prejudice to the opposing party
 11 by virtue of allowance of the amendment, [or] futility of amendment.” Fed. R. Civ. P. 15(a)(2);
 12 *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). Generally,
 13 leave to amend is only denied when it is clear that the deficiencies of the complaint cannot be
 14 cured by amendment. See *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir.
 15 1992).

16 DISCUSSION

17 I. Plaintiff’s Motion to Remand (#4)

18 Plaintiff filed a motion to remand because the case did not meet the minimum \$75,000
 19 amount in controversy for diversity jurisdiction. (Mot. to Remand (#4) at 1). Plaintiff also
 20 argued that this Court lacked removal jurisdiction based on *Chapman v. Deutsche Bank Nat’l*
 21 *Trust Co.*, ___ F.3d ___, 2011 WL 2508152 (9th Cir. 2011). (*Id.* at 2).

22 Trustee Corps responded that it had filed a petition for removal based on Plaintiff’s
 23 federal claims which included TILA and FDCPA claims. (Opp’n to Mot. to Remand (#11) at
 24 3). Trustee Corps also argued that *Chapman* did not apply to the facts of this case. (*Id.*).

25 The Court denies Plaintiff’s motion to remand because this Court has federal question
 26 jurisdiction based on the TILA and FDCPA claims. See 28 U.S.C. § 1331 (stating that the
 27 “district courts shall have original jurisdiction of all civil actions arising under the Constitution,
 28 laws, or treaties of the United States”).

1 Additionally, Plaintiff's reliance on *Chapman* is misplaced. In *Chapman*, the Ninth
2 Circuit held that the doctrine of prior exclusive jurisdiction applies when there are parallel state
3 and federal proceedings that seek to determine interests in a specific property as against the
4 whole world (*in rem*) or where the parties' interests in the property serve as the basis of the
5 jurisdiction for the parallel proceedings (*quasi in rem*). *Chapman*, 2011 WL 2508152 at *3.
6 The Ninth Circuit held that, in those cases, if the state court exercised jurisdiction before the
7 federal court did, the state court's exercise of jurisdiction would take priority. *Id.* at *4.
8 However, the Ninth Circuit noted that the prior exclusive jurisdiction doctrine differed from
9 removal because, in removal, a state court loses jurisdiction upon the filing of a petition for
10 removal. See *id.* Here, there is only one proceeding and Defendants have removed that
11 proceeding to this Court. As such, the prior exclusive jurisdiction doctrine does not apply.
12 Accordingly, the Court denies the motion to remand (#4).

13 **II. Plaintiff's Motion for Stay (#9)**

14 In May 2011, Plaintiff filed a motion to stay the proceedings pending the Ninth Circuit's
15 decision in *Chapman*. (Mot. for Stay (#9) at 1). The Court denies this motion as moot
16 because the Ninth Circuit decided *Chapman* on June 23, 2011, and *Chapman* is inapplicable
17 to this case.

18 **III. Pinnacle Mortgage and Wells Fargo's Motion to Dismiss (#19)**

19 Pinnacle Mortgage and Wells Fargo filed a motion to dismiss all claims against them.
20 (Mot. to Dismiss (#19) at 1, 5). Plaintiff, counseled, did not file a response. (See
21 *generally* Docket Sheet). Pinnacle Mortgage and Wells Fargo filed a notice of non-opposition
22 and requests that this Court grant its motion to dismiss pursuant to Local Rule 7-2(d). (Notice
23 of Non-Opp'n (#22) at 2). The Court grants Pinnacle Mortgage and Wells Fargo's Motion to
24 Dismiss pursuant to Local Rule 7-2(d) because Plaintiff failed to respond to the motion. See
25 Local Rule 7-2(d) ("The failure of an opposing party to file points and authorities in response
26 to any motion shall constitute a consent to the granting of the motion").

27 **IV. Trustee Corps' Motion to Dismiss (#7)**

28 Trustee Corps moves to dismiss all claims against it. (Mot. to Dismiss (#7) at 13).

1 Plaintiff filed an opposition and Trustee Corps filed a reply. (Opp'n to Mot. to Dismiss (#15);
2 Reply to Mot. to Dismiss (#17)).

3 As an initial matter, the complaint only specifically names Trustee Corps as the
4 defendant in the fifth cause of action for debt collection violations. In all other causes of
5 action, Plaintiff makes general allegations against "defendants" but does not specifically
6 identify those defendants. However, this order will address each cause of action.

7 The Court grants Trustee Corps' motion to dismiss the first cause of action for
8 trespass. In the complaint, the only allegation that links the "Doe" defendants to a named
9 defendant is the statement that the Doe lawn maintenance defendant was "with the bank."
10 (See Compl. (#1) at 7). Trustee Corps is not a bank and, therefore, Plaintiff fails to state a
11 claim against Trustee Corps.

12 The Court grants Trustee Corps' motion to dismiss the second cause of action for
13 conversion. Conversion is "a distinct act of dominion wrongfully exerted over personal
14 property in denial of, or inconsistent with, title or rights therein or in derogation, exclusion or
15 defiance of such rights." *Edwards v. Emperor's Garden Rest.*, 130 P.3d 1280, 1287 (Nev.
16 2006). Plaintiff has not alleged any facts that Trustee Corps converted any of Plaintiff's
17 personal property and, therefore, Plaintiff fails to state a claim.

18 The Court grants Trustee Corps' motion to dismiss the third cause of action for
19 violations of TILA. TILA applies to a "creditor" who is

20 a person who both (1) regularly extends, whether in connection with loans, sales
21 of property or services, or otherwise, consumer credit which is payable by
22 agreement in more than four installments or for which the payment of a finance
23 charge is or may be required, and (2) is the person to whom the debt arising
from the consumer credit transaction is initially payable on the face of the
evidence of indebtedness or, if there is no such evidence of indebtedness, by
agreement.

24 15 U.S.C. § 1602(f). Trustee Corps is not a "creditor" because it does not regularly extend
25 credit. Instead, Trustee Corps is a company that processes foreclosure actions. See Trustee
26 Corps Website at <http://www.trusteecorps.com/home.htm> (last visited Sept. 9, 2011).
27 Therefore, Plaintiff fails to state a TILA claim against Trustee Corps as a matter of law and the
28 Court dismisses this claim without leave to amend.

1 Under the fourth cause of action, Plaintiff seeks declaratory relief based on a defective
2 notice of default. Pursuant to NRS § 107.080, the notice of default: (a) must describe the
3 deficiency in performance or payment; (b) may contain a notice of intent to declare the entire
4 unpaid balance due if acceleration is permitted by the obligation secured by the deed of trust;
5 (c) must include the physical address of the property; and (d) must include the contact
6 information of the trustee or the person conducting the foreclosure who is authorized to
7 provide information relating to the foreclosure status of the property. NRS § 107.080(3)(a);
8 NRS § 107.087(1)(b)(1)-(2).

9 In this case, the notice of default included all of the mandatory requirements. (See
10 Notice of Default (#7-1) at 34). The notice of default indicated that the deficiency in
11 performance was “failure to pay payments which became due.” (See *id.*). The notice of
12 default identified the physical address of the property on the first page. (See *id.*). The notice
13 of default told Plaintiff to contact Wells Fargo Bank to determine the amount to cure the default
14 and to determine whether reinstatement was possible. (See *id.* at 35). The notice of default
15 also provided Wells Fargo’s physical address and phone number. (See *id.*). Therefore, the
16 notice of default contained all of the mandatory, statutory requirements and the Court
17 dismisses the fourth cause of action without leave to amend.

18 The Court grants Trustee Corps’ motion to dismiss the fifth cause of action for violations
19 of debt collection, pursuant to NRS § 649.370, without leave to amend. Pursuant to NRS §
20 649.370 a violation of any provision of the federal Fair Debt Collection Practices Act
21 (“FDCPA”), 15 U.S.C. §§ 1682 *et seq.*, or any regulation adopted pursuant thereto, is a
22 violation of Nevada law. Nev. Stat. Rev. § 649.370. Foreclosure pursuant to a deed of trust
23 does not constitute debt collection under the FDCPA, 15 U.S.C. § 1692. *Camacho-Villa v.*
24 *Great Western Home Loans*, 2011 WL 1103681, *4 (D. Nev. 2011).

25 The Court grants Trustee Corps’ motion to dismiss the sixth cause of action for unfair
26 and deceptive trade practices, NRS § 598.0923. Under that statute, a person engages in
27 deceptive trade practices when, in the course of his or her business or occupation he or she
28 knowingly conducts the business or occupation, without all required state, county, or city

1 licenses. Nev. Rev. Stat. § 598.0923(1). However, the statutes explicitly state that the
2 following activities do not constitute doing business in this State: (1) maintaining, defending
3 or settling any proceeding; (2) creating or acquiring indebtedness, mortgages, and security
4 interests in real or personal property; and (3) securing or collecting debts or enforcing
5 mortgages and security interests in property securing the debts. Nev. Rev. Stat. §
6 80.015(1)(a), (g)-(h). Because Trustee Corps is explicitly exempt from acquiring licenses in
7 this mortgage case, the Court dismisses this claim without leave to amend.

8 The Court denies Trustee Corps' motion to dismiss the seventh and ninth causes of
9 action to quiet title and for statutory violations of NRS § 107.080. The publicly recorded
10 documents in this case demonstrate that Trustee Corps executed its own substitution of
11 trustee. Although Trustee Corps claims that it was acting as the attorney-in-fact for Wells
12 Fargo, there is nothing in the record to demonstrate that Wells Fargo had given Trustee Corps
13 the authority to act in that capacity. Therefore, there appears to be a statutory defect in this
14 foreclosure and the Court denies the motion to dismiss the seventh and ninth claims.

15 The Court grants Trustee Corps' motion to dismiss the eighth cause of action to rescind
16 or void the loan agreements based on mistake because Trustee Corps did not originate the
17 loan. Therefore, Plaintiff has failed to state a claim against Trustee Corps. Accordingly, the
18 Court grants in part Trustee Corps' motion to dismiss claims 1, 2, 3, 4, 5, 6, and 8, without
19 leave to amend, and denies in part the motion to dismiss claims 7 and 9.

20 **V. Emergency Motion to Extend Time (#35) & Emergency Motion to Withdraw as**
21 **Attorney (#36)**

22 On the day before oral argument, Plaintiff's attorneys, Terry J. Thomas and Sherry
23 Bowers, filed both an emergency motion to continue the hearing (#35) and an emergency
24 motion to withdraw as counsel (#36) on grounds that Plaintiff had emailed them that morning
25 stating that their "services were terminated effective immediately" and that she was repudiating
26 the obligation to pay her attorneys' fees. (Mot. to Extend (#35) at 1; Mot. to Withdraw (#36)
27 at 2).

28 For the reasons stated on the record during oral argument, the Court grants the

1 Emergency Motion to Withdraw as Attorney (#36) and denies as moot the Emergency Motion
2 to Extend Time (#35).

3 **CONCLUSION**

4 For the foregoing reasons, IT IS ORDERED that Plaintiff's Motion to Remand (#4) is
5 DENIED.

6 IT IS FURTHER ORDERED that Trustee Corps' Motion to Dismiss (#7) is GRANTED
7 in part as to claims 1, 2, 3, 4, 5, 6, and 8, without leave to amend, and DENIED in part as to
8 claims 7 and 9.

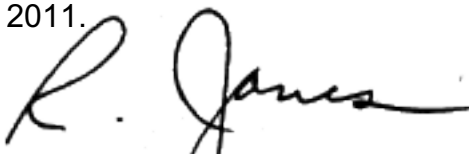
9 IT IS FURTHER ORDERED that Plaintiff's Motion to Stay (#9) is DENIED as moot.

10 IT IS FURTHER ORDERED that Pinnacle Mortgage and Wells Fargo's Motion to
11 Dismiss (#19) is GRANTED in its entirety without leave to amend.

12 IT IS FURTHER ORDERED that Plaintiff's Emergency Motion to Extend Time (#35) is
13 DENIED as moot.

14 IT IS FURTHER ORDERED that Plaintiff's Attorneys' Emergency Motion to Withdraw
15 as Attorney (#36) is GRANTED.

16 DATED: This _ 7th _ day of October, 2011.

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19 United States District Judge
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